# Regulation of Participation and Athlete Rights in High School and College Athletics

Chapter 12

# Management Contexts, Relevant Laws, and Cases

| *Management Context* | *Major Legal Issues* | *Relevant Law* | *Illustrative Cases* |
|---|---|---|---|
| High School & College Athletics | Eligibility and Discipline issues | Due Process Clause; Equal Protection Clause | *Bunger, Palmer, Pegram, Long* |
| | Transfer rules | Due Process Clause, Arbitrary and capricious standard | *Yeo, Wideman, DeLaTorre* |
| | Drug testing | Fourth Amendment | *Derdeyn, Vernonia, Earls* |
| | Dress/grooming codes | First Amendment; Equal Protection Clause | *Stephenson, Stotts, Dunham, Menora, Moody* |
| | Pregame prayer | First Amendment | *Santa Fe, Chandler, Kountze* |
| | National Anthem | First Amendment | *V.A.* |
| | Social Media | First Amendment | *T.V.* |
| | Gender Equity | Title IX and regulations | *Cohen, Mercer, EMU, Adrian, Biedeger* |
| | Pregnancy | Title IX | *Brady* |
| | Sexual harassment | Title IX | *Morrison, Jennings, Simpson* |
| | Transgender | Title IX | *Boyertown* |
| | Race discrimination | Title VI | *Elliott, Pryor* |
| | Disability discrimination | § 504; ADA | *Knapp, Dennin, Matthews* |

# Legal Issues Related to Participation in High School and College Athletics

- Eligibility and Discipline Issues
- Transfer Rules
- Drug Testing
- Dress/Grooming Codes
- Religious Speech, Protest Speech, Social Media
- Gender Equity, Pregnancy, Sexual Harassment/Violence, Transgender
- Discrimination Based on Race and Disability

# Discipline Issues

Athletes are subject to disciplinary penalties when they violate school rules.

"Conduct rules": Challenged for unfairness:

| The Due Process Clause | The Equal Protection Clause |
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# Transfer Rules

Transfer rules regulate the circumstances under which athletes may transfer to other schools/colleges.

## High school rules:

- Regulate school districts that might try to entice an athlete to move

## College rules:

- Attempt to ensure competitive balance

# Drug Testing

Widely perceived that there is a drug problem in school sports

## Reasons to test:

- Protect health and safety; level playing field; protect integrity of contests; ensure athletes are good role models

## Reasons not to test:

- Invasion of privacy; unreasonable search and seizure; unfair to single out athletes; unfair to force "consent"

# Legal Review

- What are your thoughts on drug testing?
- Is the loss of privacy worth it in order to ensure the integrity of the contest?

# Legal Analysis of a Drug-Testing Search Under the Fourth Amendment

**Legal Analysis**

In general, the issues in a student-athlete drug testing case proceed as follows:

1. Was there state action? If so,
2. Does the complained-of activity constitute a search and/or seizure? If so,
3. Was the search reasonable?
   a. Was it justified at its inception? (by probable cause, reasonable suspicion, exigent circumstances, or random searches based on other special governmental needs, e.g., airport searches)
   b. Was it reasonable in scope?

| | | |
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| (1) Individual's reasonable expectation of privacy | | (1) Government's interest in conducting the search |
| (2) Nature and degree of the intrusion | *balanced against* | (2) Efficacy of the search in meeting the government's goal |

4. If the search was reasonable, the Fourth Amendment was not violated.

# Competitive Advantage Strategies
## Drug Testing of Athletes

01

Consider whether monetary and privacy costs are outweighed by deterrent value of drug testing.

02

Limit consequences of positive test results to restrictions on participation and requiring rehabilitation; avoid criminal enforcement.

03

Maximize anonymity and accuracy in sample collection, testing, reporting, and data storage.

04

Provide opportunities for retesting to verify positive results.

# Expression Issues

- Religious Speech
- Protect Speech
- Dress, Grooming, and Personal Expression
- Students have challenged such rules.
  - First Amendment rights
  - Due Process Clause
  - Equal Protection Clause

# Freedom of Religion & Dress Codes

- Dress codes can conflict with freedom of religion (e.g., yarmulkes, head scarves, modest clothing).
- Conflicts over prayer:
  - Before games
  - As a celebratory behavior

# Social Media Posts

What happens to student-athletes who post prohibited content online?

Social media monitoring services alert athletics department personnel of inappropriate conduct/communications.

Bans on use of social media may be in violation of First Amendment protections.

# Legal Review

- Do you use social media sites such as Facebook, Instagram, Twitter, and others?
- Have you ever thought that some posts might be inappropriate and could lead to trouble?
- What do you think of the idea of monitoring services?
  - Do your opinions change if you view the concept from the perspective of an administrator, coach, or even a parent?

# Competitive Advantage Strategies
## Policies That Don't Infringe on Bill of Rights

- Have a sport-performance-related objective for dress or grooming codes.
- Develop a monitoring protocol for social media use and consider First Amendment limitations on restricting students' speech activity.
- Avoid creating and implementing pregame prayer policies.
- If students want to have pregame prayers, avoid censoring them.

# Gender Equity—Title IX

- Intended to address sex discrimination throughout education, not just in athletics.
- Results:
  - More than 3.4 million high school girls participated in athletics in 2017–2018.
  - Over 216 thousand women played college sport in 2017—2018.
- Inequities still exist
  - 44% of intercollegiate athletes were women in 2017, but the overall undergraduate student body was 56% women.

# Enforcement Process, Remedies, and Regulations

- U. S. Department of Education's Office for Civil Rights (OCR)
- Monetary damages and injunctive relief
- Punitive damages
- Still some areas of inequity

# Three Compliance Areas

**Area One – Participation Opportunities**

**Area Two – Equal Treatment in Other Program Benefits and Opportunities**

**Financial Assistance (athletic scholarships)**

# Participation Opportunities

Focus of most Title IX litigation and complaints

Regulations require institutions to "effectively accommodate the interests and abilities" of male and female athletes.

# Three-part test for compliance in participation opportunities

*Exhibit 12.5* Three-part test for compliance regarding equity in participation opportunities: The 1979 OCR Policy Interpretation.

a Compliance will be assessed in any one of the following ways:

1 Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

2 Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

3 Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Source: U.S. Dept. of Education, 1979.

# Other Compliance Areas

## Area Two - Other Program Benefits

- Equipment, Supplies, Scheduling, Coaches, Locker Rooms, Training Staff, Housing, Publicity, Office Space, Recruiting

## Area Three - Scholarships

- Athletic scholarships must be awarded to members of each sex in proportion to the total number of athletes participating

# Related Issues in Gender Equity

- Reverse discrimination
- Contact sports
- Pregnancy

# Competitive Advantage Strategies
## Gender Equity

- Consider adding a women's sport or elevating it to varsity status if there's interest and ability.
- Consider alternatives to dropping men's sports when moving toward compliance.
- When boosters or alum give money for a single-sex sport, purchase something comparable for the other gender's program.
- Remember that Title IX applies to clubs and intramurals as well as to varsity sports (not combined).

*continued*

# Competitive Advantage Strategies, *continued*

- Make sure that the gender ratio of dollars spent on grants-in-aid mirrors the gender ratio of athletes.
- Conduct training seminars for coaches and players to help them avoid sex-discrimination behaviors.
- Invite Title IX consultants to assist with program evaluation and development of compliance strategies.
- Reallocate resources equitably by identifying ways to reduce unnecessary costs.
- Plan ways to increase resources for sports for women (including corporate sponsorships and targeted broadcasting agreements).

# Sexual Harassment /Violence

Sexual harassment/violence that occurs in an educational institution may be litigated under Title IX.

The Supreme Court has upheld the use of monetary damages.

Trends: Sexual harassment lawsuits against coaches; Sexual violence lawsuits against athletes.

# Competitive Advantage Strategies Avoiding Sexual Harassment Claims

| | |
|---|---|
| Develop, implement, and publicize | Develop, implement, and publicize a sexual harassment policy that includes a reporting and appeals process. |
| Remind Constituents | Remind all constituents that sexual harassment is not just an issue of men harassing women. |
| Establish | Establish a reporting procedure that encourages those who witness sexual harassment to report it. |
| Investigate | Investigate allegations of harassment promptly. |
| Remind Athletes & Coaches | Remind athletes and coaches that on-campus policies also apply when they are traveling. |

# Race Discrimination

- Racism is subtler than gender discrimination and more difficult to prove.
- Very little litigation brought by student-athletes.
- Plaintiffs may bring suit under Title VI of the Civil Rights Act of 1964.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

# Competitive Advantage Strategies
## Race Discrimination

Avoid establishing eligibility standards that place a lot of weight on data that may be racially biased (such as standardized test scores).

Distinguish between a policy that has a negative effect on members of an ethnic minority group *because of* their ethnicity and one that does so *in spite of* their ethnicity.

# Disability-Based Discrimination

Should an athlete with a disability be accommodated?

What kinds of accommodation are reasonable?

What constitutes a disability?

Lawsuits have been filed under:

- § 504 of the Rehabilitation Act
- Americans with Disabilities Act

# Legal Analysis Under § 504 and Title II of ADA

**The plaintiff must prove that they are:**

- Disabled
- Otherwise qualified
- Excluded solely on the basis of disability

**To prove they are disabled, the plaintiff must prove that they have a:**

- Physical or mental impairment which substantially limits one or more major life activity

# Learning Disabilities

Learning difficulties are a challenge for courts.

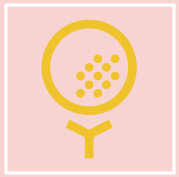
Eligibility rules for athletes:

- Age limits
- Longevity rules that limit number of semesters of eligibility
- Academic standards

# Title III of ADA

Lawsuits against private entities that own, lease, or operate places of public accommodation.

Used primarily against the NCAA.



*PGA Tour, Inc. v. Martin* (2001): The PGA Tour operates places of public accommodation.

# Athletics Teams for Participants Who Are Disabled

- Are high schools and universities legally obligated to provide separate teams for athletes with physical disabilities?
- University of Illinois Wheelchair basketball with scholarships, more and more schools offering opportunities.
- Maryland legislation.

# Competitive Advantage Strategies
## Disability Discrimination

01

Consider offering special teams for people with disabilities.

02

Assess each request for accommodation individually.

03

Establish internal complaint procedures for resolving ADA and §504 disputes.